

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

UNITED STATES POSTAL SERVICE

and

Case 12-CA-207188

ANN DOLAN, an Individual

**GENERAL COUNSEL'S BRIEF TO  
THE ADMINISTRATIVE LAW JUDGE**

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## **I. INTRODUCTION**

On September 7, 2017, the United States Postal Service (Respondent or Postal Service) discharged its employee Ann Dolan because she sought the assistance of American Postal Workers Union (APWU or the Union) and requested that the Union file grievances on her behalf. Prior to her discharge, Dolan had worked off and on as a Postal Support Employee for approximately 10 years. Although Dolan left employment for various reasons, including the expiration of her appointment as a PSE, she was always marked as eligible for rehire. While the Employer contends that it discharged Dolan because she failed to follow instructions, performed unsatisfactory work, and took extended breaks, it is apparent that the discharge was motivated by Dolan's decision to seek assistance from the Union. The following sections of this brief will set forth the procedural history, an overview, and a description of the issues presented. That will be followed by a detailed discussion of the facts, relevant case law, and legal argument.

### **A. Procedural History**

Dolan filed the original charge in Case 12-CA-207188 on September 28, 2017. (GC 1(a)).<sup>1</sup> A Complaint and Notice of Hearing issued on December 29, 2017. (GC 1(d)). Respondent filed an answer on January 11, 2018, denying that they engaged in any unfair labor practices. (GC 1(f)). In Respondent's answer, it admitted the complaint allegations concerning service of the charge, jurisdiction, and that the Union is a labor organization within the meaning of the Act. Furthermore, with the exception of Draven Leto, Respondent admitted that the individuals named in paragraph 4 of the Complaint are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of 2(13) of the Act. (GC 1(f)). During the hearing, which was held before Hon. Judge Michael A. Rosas on May 21, 2018, May 29, 2018,

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<sup>1</sup> As used herein, the numbers following "Tr." refer to the page and line numbers of the transcript. For example, "Tr. 68:19-22" refers to transcript page 68, lines 19 to 22. In addition "GC" refers to General Counsel's exhibits and "R" refers to Respondent's exhibits.

and May 30, 2018, Respondent admitted that Draven Leto is a supervisor within the meaning of Section 2(11) of the Act. (Tr. 6:13 to 22).

## **B. Overview**

The Postal Service operates numerous facilities throughout the State of Florida which handle, sort, and distribute mail, including the Ybor processing and distribution center (Ybor P&DC). (Tr. 74:13 to 75:20 and 133: 4 to 7). Mail handlers, mail processors, and other postal employees work together at Ybor P&DC. (Tr. 109:12 to 17).

At all material times, the Postal Service and American Postal Workers Union, including Local 259, were parties to a collective-bargaining agreement which is in effect by its terms from May 21, 2015 through September 20, 2018. (GC 1(d)).

Prior to working at Ybor P&DC, Dolan successfully worked at the Postal Service as a PSE at various locations. (Tr. 73:12 to 74:20). Dolan routinely left the Postal Service throughout her tenure for various reasons, but was eligible for rehire after each time she left. *Id.* In January 2017, Dolan left the Postal Service due to a lack of available work, and was placed on a rehire list. (Tr. 75:13 to 18). Dolan was contacted about returning to the Postal Service on July 7, 2017, and Dolan promptly responded indicating her desire to be rehired. (GC 16; Tr. 75). The Postal Service immediately agreed to rehire Dolan and scheduled her to begin work on July 22, 2017. (GC 17; Tr. 74:16 to 20). However, Respondent failed to complete the hiring process in a timely manner and Dolan's start date was delayed. (GC 18; Tr. 74). As a result, Dolan informed several Postal Service agents and supervisors that she had, "... contacted the union for assistance and possibly filing a grievance." (GC 18). Finally, on August 7, 2017, Dolan was given a start date of August 5, 2017, but she did not actually begin working until August 17, 2017. (GC 18; Tr. 83:9 to 23).

The day after she began working at the Ybor P&DC facility, she started having issues with the Postal Service. (Tr. 88:22 to 91:10). Those issues included scheduling and breaks, and Dolan spoke with the Union on multiple occasions to resolve these problems. (Tr. 94:1 to 2; Tr. 95:22 to 24; Tr. 100:12 to 19; Tr. 101:21 to 23; Tr. 107:5 to 9; Tr. 107:23 to Tr. 108: 4; Tr. 143:14 to 16; and Tr. 144:14 to 16). Dolan even filled out a grievance and presented it to the Union to be filed in an attempt to resolve these issues. (Tr. 94:15 to 24; GC 21).

On September 7, 2017, after having only worked for 21-days, Dolan was given a 30 day evaluation and told that her work performance was unsatisfactory and was then discharged. (Tr. 37; and Tr. 125 to 126). While Dolan was being informed of her discharge, supervisor Jeremy Wray told Dolan that her discharge was not up for discussion because, “You contact the steward on a daily basis. You have been trouble since day one.” (Tr. 123:17 to 18).

### **C. Issues Presented**

The question to be resolved is whether Respondent discharged Dolan because she engaged in Union activity in violation of Section 8(a)(1) and (3) of the Act as alleged in the complaint. As discussed in detail below, the record evidence establishes that Respondent violated the Act as alleged in the Complaint.

The following section of this brief sets forth a detailed description of the facts. In connection with this description of facts, certain evidentiary and credibility issues that arose at the hearing will be addressed. Next, the brief will discuss the relevant Board law and explain why Your Honor should conclude that Respondent violated the Act as alleged in the Complaint. The brief will also address the appropriate remedies for Respondents’ unfair labor practices.

## **II. FACTS**

### **A. Dolan's Qualifications.**

Ann Dolan successfully worked for the Postal Service off and on for approximately 10 years at several different locations, in a variety of positions. (Tr. 73:12 to 74:20). Dolan was eligible for rehire after each time she left the Postal Service's employ as evidenced by the Postal Service's consistent and continued rehiring of Dolan. Dolan's education also demonstrates that she was fully qualified and capable of performing Postal Support Employee work. (Tr.75:1 to 4). Lastly, it is apparent that Dolan's skills and experience were sought after by the Postal Service until she sought assistance from the Union. (GC 20 email from Keith Beattie sent August 4, 2017 at 9:58 am). As such, Dolan was capable of performing the work at the Ybor P&DC, had successfully performed this work in the past at other locations, and the evidence reveals that she continued to perform satisfactory work while employed at the Ybor P&DC.

### **B. Hiring Process.**

Ann Dolan was solicited by the Postal Service to be rehired as a Postal Support Employee on July 7, 2017, and Dolan requested to be rehired the following day. (GC 16; Tr. 79 to 80). Human Resources Specialist Vicki Plummer did not include all of the required documents in the July 7 email, and instead waited until July 12, 2017, to provide all of the necessary documents. (GC 17). Dolan promptly completed and returned the necessary documents, and the Postal Service provided Dolan with an effective start date of July 22, 2017. *Id.* On July 15, 2017, Dolan followed up with Plummer by email, inquiring about her onboarding as her start date was one week away. (GC 18). Plummer replied to Dolan by email on July 17 stating, for the first time, that Dolan would have to undergo a review by the Medical Unit. *Id.* Three days after Plummer's email, Keith Beattie from Postal Service Medical Review contacted Dolan and

instructed her to complete additional paperwork. (GC 19). The request that Dolan complete additional paperwork came almost two weeks after she initially submitted her application for rehire on July 8, 2018. (GC 19). Dolan was unable to start work on July 22, 2017 because of these delays. (Tr.74:16 to 20; and Tr. 86).

Dolan was medically cleared for work the morning of August 4, 2017, and Dolan contacted Plummer by email that same day inquiring about her start date. (GC 18, 20). Plummer responded three days later on August 7, 2017, and informed Dolan that her start date would be changed from July 22, 2017 to August 5, 2017.<sup>2</sup> *Id.* However, Dolan did not begin working until August 17, 2017, despite the Postal Service changing Dolan's start date to August 5. (Tr. 86:21 to 23). Instead of proactively processing Dolan for rehire, the Postal Service was reactive, only responding to Dolan's requests for updates. This unnecessary delay by the Postal Service caused employees with less seniority to be hired over Dolan. Dolan was upset about this and complained to the Postal Service by email, informing them that she was talking to the Union about filing a grievance over the delay. (GC 18, 20; Tr.86 to 87). Specifically, Dolan informed Vicki Plummer, Dana Cowgill, and Marisol Ongrady, that she was reaching out to the Union about filing a grievance because of her delayed start date. (GC 18). Dolan also informed Keith Beattie that the Postal Service was not abiding by the rehire list, and that she was being discriminated against. (GC 20).<sup>3</sup>

### **C. Dolan Starts Work and Has Issues with Her Schedule**

Dolan completed her orientation on August 17, 2017. (Tr. 88:14 to 21). At the end of orientation, supervisor Dan Fisher instructed Dolan to report to work the following day, August

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<sup>2</sup> Of course, Dolan could not have started on August 5, as she was not given that start date until after it had already passed.

<sup>3</sup> Dolan informed four separate individuals that she was seeking to enforce the rehire list as out lined in the collective bargaining agreement, before she started working at Ybor P&DC.

18, 2017, at 10:00 pm. (Tr. 88:19 to 89:17). Dolan reported to work at 10:00 pm on August 18, 2017, as instructed. Supervisor Angela Lewis was standing near the time clock when Dolan and another postal employee clocked in at 10:00 pm on August 18, 2017. Dolan heard one of her supervisors, Jeremy Wray, tell Angela Lewis over the walkie-talkie to instruct Dolan and the other employee to clock out and punch back in at 10:30 pm. (Tr. 89 to 91).

On August 25, 2017, Dolan attempted to clock in at her scheduled start time of 9:00 pm. (Tr. 91 to 94). However, supervisors Flick and Johnson stopped her, and instead instructed Dolan to clock in one and a half hours later at 10:30 pm. (Tr. 92 to 93). After being told that she could not clock in until 10:30 pm, Dolan asked supervisor Johnson or Flick for permission to speak with a Union representative. (Tr. 93:18 to 94:7). While it is unclear whether or not Dolan specifically informed the supervisors why she wanted to speak with the Union representative, the circumstances and timing make it clear that Dolan wanted to speak with a Union representative to raise the issue of not being able to clock in at her scheduled start time. Dolan was told that a Union representative was not available, so she went to her car and filled out a grievance form. (Tr. 94; and GC 21). Dolan reiterated her request to speak with a Union representative when she was finally permitted to clock in at 10:30 pm. (Tr. 95:18 to 96:2).

At 1:00 am, four hours after her initial request to speak with a Union representative, and two hours after the Union representative started working; Dolan was allowed to speak with a Union representative. (Tr. 96:9 to 13).

**E. Dolan Complains to the Union about the Postal Service's Failure to Follow the Break Policy.**

The Postal Service has set breaks which are required to be issued every two hours with a 15 minute leeway.<sup>4</sup> (Tr. 98 to 99). Other Postal Service locations where Dolan had previously

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<sup>4</sup> After working for two hours plus or minus 15 minutes, postal employees receive either a 15 minute break or a 30 minute lunch. Then two hours later plus or minus 15 minutes, the postal employee will receive another 15 minute

worked issued breaks in accordance with this policy, however, the Ybor P&DC refused to adhere to the break policy. (Tr. 99: 9 to 14). Dolan complained to the Union regarding the Postal Service's refusal to abide by the break policy. (Tr. 99 to 100). Further, other career postal employees complained about this policy. (Tr. 99 to 100).

On or about September 2, 2017, supervisor Johnson told all relief PSEs starting at 9:00 pm, including Dolan, to go to lunch after only working one hour. (Tr. 101:4 to 7). Dolan complained to Johnson, telling her that she had spoken to the Union about the break issue and informed Johnson that this was not supposed to happen [untimely breaks]. (Tr. 101-102). Johnson responded that this was the way supervisor Wray wanted it, and that she was just following orders. (Tr.102). Johnson continued to insist that all PSEs starting at 9:00 pm go on break after only working 1 hour, despite Dolan's protest. (Tr. 102:2 to 4). Dolan saw Manager of Distribution Operations Dan Fisher while on the way to take her break. (Tr. 102: 5 to 16). Dolan informed Fisher, who is a higher level supervisor than Johnson, that the PSEs were being made to take their lunch early. *Id.* Fisher immediately addressed the issue with Johnson upon learning that Johnson was not following the break policy. *Id.* Specifically, Fisher told Johnson that the PSEs have fixed schedules with a 15 minute leeway for breaks, and that policy needs to be adhered to. *Id.* Dolan and the other PSEs continued working after Fisher spoke to Johnson. *Id.*

Later during the same shift, Johnson again told Dolan and the other PSEs to take their break outside of the 15 minute leeway. (Tr. 102:17 to 25). Dolan again saw Fisher on her way to clock out, and complained that Johnson was refusing to abide by the break policy. (Tr. 103). Again Fisher stated that this was not going to happen and went to speak with Johnson. *Id.* The

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break or lunch. Lastly, after working two more hours plus or minus 15 minutes, the postal employee receives their last break or lunch.



break policy is an established term and condition of employment and Dolan's efforts to ensure that Respondent complied with the established policy constitutes union activity

**F. Dolan is Discharged.**

Dolan was discharged from the Postal Service the morning of September 7, 2017. (Tr. 103:17 to 104:2). Dolan's shift started on September 6, 2017. *Id.* Dolan worked without issue on September 6, 2017. (Tr. 103 to 104). At approximately 12:30 am on September 7, Postal Service supervisor Angela Lewis informed Dolan that she had not clocked back in from lunch during her previous shift. *Id.* Angela Lewis threatened Dolan with an "end tour" if Dolan missed another time punch. (Tr. 105:8 to 12). An end tour occurs when a Postal Service supervisor clocks an employee out for the remainder of the day and the employee is not paid. (Tr. 105:16 to 106:6). Dolan worked for the Postal Service off and on for approximately a decade; however, this was the first time Dolan had ever been threatened with an end tour, and the threat was made despite this being the first time Dolan had missed a time punch. (Tr. 104-107). Furthermore, Angela Lewis admitted to Dolan that other employees fail to clock out on a regular basis, but still threatened Dolan after only one missed punch. (Tr. 105:7 to 14).

Dolan asked that Angela Lewis check into the missed time punch, but Angela Lewis refused. (Tr. 105:14 to 15). Dolan informed Angela Lewis that the supervisor was required to show the employee the blank clock ring, but Lewis still did not show Dolan the missed punch. (Tr. 105). Dolan felt uneasy after her interaction with Angela Lewis, so she asked another supervisor, Mike Spanos, to pull her clock rings so that she could investigate the missed time punch. (Tr. 107: 3 to 13).

After speaking with Spanos, Dolan informed another supervisor, Curtis Lewis, of what transpired, including that Angela Lewis failed to abide by the policy of showing Dolan the

missed time punch. (Tr. 107 to 108). After Dolan explained what happened, she asked Curtis Lewis if she could speak to a Union representative about what had transpired with Angela Lewis. *Id.* Curtis Lewis gave Dolan permission to speak with a Union representative, and Dolan discussed the matter with the Union. (Tr. 107:23 to 108:7).

On September 7, as had happened in the past while working at Ybor P&DC, Dolan was assigned to complete work that was outside of her scope of work as a mail processor. (Tr. 108:16 to 111:21). During the work shift from September 6 to September 7, supervisor Draven Leto tasked Dolan with completing mail handler work, despite Dolan being a mail processor, not a mail handler. (Tr. 109:8 to 17). Specifically, Leto assigned Dolan and several other mail processors with retrieving metal cages from the small parcel bundle sorter, and bringing them to the mail processors, so they could process the mail. (Tr. 109). Dolan was not medically cleared to complete the out of scope work and she complained to supervisor Leto that her doctor had not cleared her for this work. (Tr. 111). Dolan had also previously brought this issue to the attention of the Union.<sup>5</sup> The Union was well aware that this was an ongoing issue, and indicated that Postal Service management routinely violated this policy. (Tr. 111:3 to 15).

In the early morning hours of September 7, 2017, supervisor Johnson asked supervisors Draven Leto and Samer Jabber, to have Postal Employees come to the Automated Parcel Bundle Sorter (APBS), which is also known as the Small Bundle Parcel Sorter (SPB). (GC 15; and Tr. 47:4 to 10). At around 3:15 am, Leto instructed Dolan to go and work relief on the APBS. (Tr. 115:11 to 15).<sup>6</sup> Dolan responded by informing Leto that she still needed to receive her second

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<sup>5</sup> Of note, this was the second time during her shift from September 6 to September 7 that Dolan sought Union representation.

<sup>6</sup> This directly contradicts supervisor Jeremy Wray's account of the facts that this incident occurred on September 6, 2017. (Tr. 166:17 to 167:8). Wray goes on to incorrectly say that on September 6, he spoke with Flick about Dolan not being in her assignment area for the evening, however, that incident did not occur until the end of Dolan's shift in the morning of September 7. (Tr. 163:18 to 164:13). Wray should be discredited to the extent his testimony conflicts with the testimony offered by Dolan.

break. (Tr. 115:16 to 116:5). Dolan was told to inform supervisor Johnson that she had not yet received her second break. (Tr. 116:1 to 7). When Dolan arrived at the SPB, she proceeded to ask each Postal Service employee if they needed relief to go on lunch or break. (Tr. 116:8 to 24). Dolan ultimately found a position on the machine that no one was manning, and began to work there. *Id.* The area Dolan was tasked with was in disarray when she arrived, and Dolan immediately began diligently working to clean up the disheveled area. (Tr. 116 to 117). Shortly thereafter, supervisor Johnson asked Dolan to work another 10 minutes, and then to go on her break. (Tr. 117:9 to 13; Tr. 136:15 to 22; and GC 15). Dolan worked another 10 minutes, and then went on her break as instructed. (Tr. 117:24 to 118:10).

Dolan was stopped by supervisor Angela Lewis while returning to work after finishing her break. (Tr. 118:11 to 15). Supervisor Angela Lewis asked if Dolan was on the clock, and when Dolan stated that she was, Ms. Lewis assigned Dolan to sort mail. (Tr. 118:11 to 25). Once Dolan was given this instruction by supervisor Angela Lewis, she was required to carry out the order or otherwise face disciplinary action. (R 1, Section 665.15).<sup>7</sup> After Dolan completed the tasks assigned to her by Angela Lewis, supervisor Curtis Lewis told Dolan to move boxes. (Tr. 119:1 to 9).

Supervisor Johnson indicated that she returned to the SPB after Dolan's break was finished, but she did not see Dolan. (Tr. 136:23 to 137:13). When Johnson did not see Dolan at the SPB, she assumed, without further investigation or inquiry, that Dolan was taking an extended break. (Tr. 137:8 to 13). However, as described above, Dolan had returned from break and was performing the work assigned to her by Angela Lewis and then Curtis Lewis. (Tr. 118:11 to 119:9).

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<sup>7</sup> Even if Dolan had been instructed to remain at the SPB for the remainder of the night, which she was not, she still would have had to abandon that assignment to comply with Angela Lewis' subsequent instruction to sort mail.

At the end of her shift on September 7, 2017, Dolan asked supervisor Curtis Lewis when she was scheduled to report to work next. (Tr. 119:10 to 12). Mr. Lewis contacted someone on the phone to inquire when Dolan was scheduled to work, and then told Dolan that she needed to report to Wray's office. (Tr. 119:13 to 18). While Dolan was walking to Wray's office, she was stopped by supervisor Flick and informed that it was time for her 30 day evaluation. (Tr 119:21 to 120: 4). Dolan informed Flick that she had only been working for 21 days; however Flick stated that it did not matter. *Id.*

Johnson approached Dolan while she was talking with Flick, asked where Dolan went after her break, and told her that she was supposed to go back to the SPB after her break. (Tr. 120:5 to 11). Dolan explained to Johnson that she had only been tasked with completing relief on the SPB. (Tr. 120:12 to 13). Dolan then asked Flick for a Union representative. Flick told Dolan that there was no need to have a Union representative for a 30-day evaluation. Dolan informed the supervisors that she had been instructed to request a Union representative whenever she believed that discipline might be issued. (Tr. 120). Johnson then told Dolan that [discipline] was not what she was going to talk about. *Id.*

Dolan was left with no choice other than to go into the meeting without a Union representative. (Tr. 120:5 to 121:1). Dolan went into the supervisors' office with Flick and Johnson, where Wray was waiting with Spanos. (Tr. 122:10 to 14). After entering the office, Flick briefly went over the evaluation form, telling Dolan that she had received unacceptable ratings in every category. (Tr. 122:18 to 123:2). While Flick was going over the ratings, supervisor Curtis Lewis came into the supervisors' office. (Tr 123:3 to 5). Dolan informed Curtis Lewis that she was receiving unsatisfactory ratings on the Employee Evaluation, and asked what he thought of her performance. (Tr. 124:8 to 10). Curtis Lewis said Dolan had not been there

long enough for him to evaluate her, and he went on to say that he normally gives employees unsatisfactory ratings to encourage them to work harder. (Tr. 124:8 to 14).

Supervisor Draven Leto also came into the office while Flick was reviewing the evaluation with Dolan. (Tr. 122:20 to 123:2). Dolan asked Leto whether or not she had been assigned to work the SPB machine for the remainder of the night. (Tr. 123:24 to 124:2). Leto responded by saying that he only told Dolan to work relief. (Tr. 124:3). Neither Johnson nor Flick heard Leto's response, so Dolan asked again, but Leto did not answer. (Tr. 124:3 to 7).

Flick then told Dolan that she was not being recommended for retention—thereby effectively discharging her. Dolan again informed Flick that she was receiving the 30 day evaluation after only working for 21 days. (Tr. 123:7 to 11). At that point, supervisor Jeremy Wray stated that the decision was not open to discussion. (Tr. 123:12). Wray went on to say that Dolan contacted the steward on a daily basis, and said that Dolan had been trouble since day one. (Tr. 123:12 to 20). Wray never refuted the claim that he told Dolan that she had gone to the union since day 1. (Tr. 171:6 to 16). Wray continued and asserted that Dolan had lied about a supervisor named Dan F. (Dan Fisher), and claimed that there was no supervisor with that name. (Dan F. was the supervisor who instructed Dolan to report to work at 10:00 pm on August 18, 2017) (Tr. 124). Dolan then asked for, and was given, her clock rings. (125:9 to 12). Dolan then left the facility. (Tr. 125:12 to 16).

Dolan received no discipline, coachings, or discussions prior to her discharge on September 7, 2017. (Tr. 49; Tr. 125; and Tr. 149 to 150).

According to supervisor Robyn Flick, Dolan was discharged for failure to follow instructions, taking long breaks, and complaining about particular job assignments. (Tr. 37:10 to 15). Flick relies on Dolan's purported failure to return to work on the SPB machine as the basis

for her conclusion that Dolan took extended breaks and failed to follow instructions. (Tr. 37 to 38; Tr. 51 to 62; and GC 14 and 15). Of course, Dolan was not told to return to the SPB machine and was in fact instructed by supervisors Angela Lewis and Curtis Lewis to perform other work. (Tr. 115 to 119). Of note, Flick does not mention unsatisfactory work performance as a reason for Dolan's discharge. (Tr. to 38:16).

Supervisor Wray contends that Dolan was tracked down, and then refused to follow the supervisor's instructions to work inside her area. (Tr. 166:23 to 167:2). However, neither Flick nor Johnson testified they had to track down Dolan, or that Dolan refused an instruction to return to a specific work area. Furthermore, Dolan credibly testified that she followed the instructions given to her. Accordingly, Wray's testimony regarding this incident should be discredited.

Supervisors Flick, Johnson, and Wray disagree on how the events of September 6 and 7 influenced Flick's decision to discharge Dolan. Johnson testified that Flick had already filled out the Employee Evaluation form prior to the incident, and that this incident did not affect the decision to discharge Dolan. (Tr. 142:22 to 143:3; Tr. 145:1 to 9). Johnson further testified that she did not tell Flick about the SPB incident until after the email was drafted and Dolan was discharged. (Tr. 144:6 to 13; and 153:11 to 20). According to Johnson, Dolan was discharged around 6:00 am, and the email was not sent until 6:20 am, and Johnson did not inform Flick of the incident until after the email was sent. (Tr. 141:2 to 7; GC 15). Flick indicated that Dolan was discharged even earlier at 5:30 am. (Tr. 59:6 to 7).

The September 7 incident was clearly a pretext used to justify the decision to discharge Dolan as the Postal Service did not conduct any investigation into the matter, nor did they seek Dolan's version of events. (Tr. 45:2 to 8). There is also no evidence that Johnson, Flick, or Wray ever asked supervisors Angela Lewis, Curtis Lewis, or Draven Leto, what happened during the

incident. (Tr. 62:12 to 23). The only action that was taken was Wray asked Johnson to send an email confirming the narrative that he had already been told by Johnson. (Tr. 139:5 to 11). Flick also contradicted Wray when she stated that she completed the Employee Evaluation form on September 7, 2017, whereas Wray indicated that the Employee Evaluation was completed on September 6, prior to the September 7 incident. (Tr. 43:9 to 11; and Tr. 162:23 to 163:19). Supervisor Wray also contradicts himself by saying that Flick made the decision to discharge Dolan, and then later stating that “We based that Robyn’s issues...” (Tr. 166:1 to 8; and Tr. 168:6 to 11).

The testimony offered by Respondent’s witnesses regarding the reasons for the discharge of Dolan is inconsistent and should not be credited where such testimony conflicts with the testimony offered by Dolan.

#### **G. The Respondent Treated Dolan in a Disparate Manner.**

Dolan was evaluated and discharged after working only 21 days. (Tr. 122 to 123) No other probationary employee was discharged, or even given an evaluation prior to working 30 days. (GC 2(a); GC 3; GC 4(a) and (b)). Furthermore, unlike the manner in which it treated Dolan, the Postal Service provided other employees who received initial unsatisfactory ratings an opportunity to improve and correct their behavior.<sup>8</sup> (GC 2(c); GC 4(b)).

For example, PSE Sharla Atakpa was given a letter of warning for leaving an assigned area without permission, and then clocking out early and leaving, but only after an investigative interview and a number of discussions. (GC 5). PSE Matthew Gard received only a letter of warning for leaving the facility after being instructed to work in a specific area. (GC 6). Kristal House was assigned to work at a specific location at 4:15 am. (GC 7). House then left the area,

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<sup>8</sup> It is important to note that despite Jeremy Wray’s assertion that corrective discipline does not apply to probationary employees, probationary employees routinely receive corrective discipline. (GC 2(a) and (b); and GC 4(a) and (b)).

and was found in the break room at 4:45 am. *Id.* When confronted about taking an extended break, House became hostile and belligerent, and left the facility. *Id.* Kristal House received a letter of warning. *Id.*

During the course of the hearing, Respondent's counsel asserted that its Labor Department reviews requests for discipline to ensure that they are appropriate. (GC 10(c); and Tr. 27:16 to 18). For example, supervisor Regina (Gigi) Johnson requested Katie Thompson be issued a seven day suspension; however the Postal Service's Labor Department refused to approve the request. (GC 10(c)). Johnson's request for discipline was denied, despite the extensive narrative included on the form, because the request did not describe the instruction given to Thompson. (GC 10(b) and (c)). Labor Relations Specialist Nicole Koss explained that, "If instructions were given to the employee throughout the work day they should be annotated as such to include by whom, the instruction, date, and time." (GC 10(c)). Johnson's request for Katie Thompson's discipline was also denied because the investigative interview, "... did not include any questions in regards to the instructions that were not followed ..." (GC 15).

Here, the email prepared by Johnson fails to include the detail required by the Labor Relations department. In fact, according to Johnson's email, the only instruction given to Dolan was to, "... sweep for another 10 minutes to get the sweep current, then go on her break." *Id.* There is no indication that Dolan failed to follow this, or any, instruction. Respondent also failed to conduct an investigatory interview with Dolan or ask about the instructions she purportedly failed to follow. Flick and Wray's testimony that the request for disciplinary action and Johnson's email were sufficient explanations of what occurred is contradicted by the instructions given by Respondent's Labor Relations department and appears to be nothing more than an attempt to justify the decision to discharge Dolan. (Tr. 44:5 to 45:1; and 192:25 to 193:25).



Lastly, there is no evidence that Flick's request for discipline was reviewed or approved by Labor Relations prior to its issuance, or subsequent to Dolan's discharge. The only person to approve the requested discipline was supervisor Wray, the day after Dolan's discharge.

In the instant Case, the Postal Service failed to conduct an investigation of any sort into the incident with Johnson and Dolan. (Tr. 45:5 to 11). No evidence was solicited regarding Dolan not following instructions. At no time did the Postal Service ever ask for Dolan's account of what happened on September 7, because Flick used this incident as a pretext to discharge Dolan. (Tr. 45:9 to 11).

## **J. Evaluation and Development of Employees**

Supervisors are also supposed to guide, counsel, train, and assist new employees to correct deficiencies. (GC 11(b) Section 584.2). Despite this admissive, Dolan received no feedback from Respondent while working at the Ybor P&DC until she was discharged on September 7, 2017. (Tr. 49:8 to 24; Tr. 126:1 to 15; and GC 14). While Wray asserted that probationary employees do not receive corrective action, supervisor Flick testified that discipline at the Postal Service is to be corrective. (Tr. 186:18 to 20; and Tr. 35:5 to 7). Supervisors are to provide constant evaluation throughout the probationary period as well as devoting attention to probationary employees in training sessions and on the job, to ensure that they succeed where they would otherwise be discharged. (GC 11(b) Section 584.1 and Section 584.2). Additionally, new employees are supposed to receive orientation and training. *Id.* Here, Respondent made no effort to assist Dolan with improving her performance or correcting behavior. Rather, Respondent seized on the purported failure to follow instructions and used it as a pretext to discharge Dolan.

### III. Argument

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982).<sup>9</sup>

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where

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<sup>9</sup> The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4<sup>th</sup> Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014) ; *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9<sup>th</sup> Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6<sup>th</sup> Cir. 1997)) .

As described above, Dolan engaged in union activity on numerous occasions between the time Respondent solicited her for rehire and her discharge on September 7, 2017. The Union activity started when Dolan informed Respondent that she would be contacting the Union regarding the change to her start date. It continued when she asked to speak with a Union

representative on August 25, 2017 and on September 7, 2017. Dolan also engaged in Union activity when she complained about Respondent's failure to abide by the established break policy and about being assigned out of scope work. Finally, Dolan requested a *Weingarten* representative just prior to her discharge.

The evidence is clear that Respondent was aware of Dolan's Union activity. Furthermore, it is apparent that Respondent harbored animus toward that activity as demonstrated by Wray's statement that Dolan had been nothing but trouble from day one and had contacted the Union on a daily basis. Respondent's animus is also shown by the disparate manner in which it treated Dolan, discharging her without warning or an opportunity to improve her performance, while issuing less harsh discipline to employees who engaged in more serious infractions.

Dolan engaged in Union activity, Respondent was aware of that activity, harbored animus toward that activity, and was motivated, at least in part, to discharge Dolan because of her union activity. Thus, the General Counsel has met his *Wright Line* burden and established a *prima facie* case and Respondent cannot establish that it would have discharged Dolan in the absence of her Union activity.

Respondent will likely argue that it discharged Dolan because she took an extended break on September 7, 2017, and then failed to follow instructions and return to the SPB machine. Respondent may also contend that it considered Dolan's complaints about her work assignments when it decided to discharge her. However, contrary to that assertion, Dolan performed that work to which she was assigned by supervisors Angela Lewis and Curtis Lewis. Respondent has offered no evidence, and has not even asserted that Dolan failed to follow instructions on other occasions. (Tr. 37:22 to 38:1). The disparate manner in which Respondent

treated Dolan is further evidence that its asserted reasons for the discharge are pretext. Thus, employees Atakpa, House and Gard were merely warned when they left the facility, thereby effectively refusing to follow instructions that they did not like. Respondent simply does not discharge employees for engaging in the type of misconduct of which Dolan was accused. Furthermore, Respondent routinely performs investigations when an employee is accused of misconduct and it would have investigated Dolan if it really intended to discharge her for failing to follow instructions. Finally, the conflicting explanations offered by Respondent's supervisors for the discharge of Dolan is further evidence of pretext. Respondent discharged Dolan because she constantly sought assistance from the Union, tried to enforce the terms of the contract, and requested a *Weingarten* representative, as revealed by Wray's statement at the discharge meeting, and any other explanation is pretext. Thus, Respondent has not shown that it would have discharged Dolan if she had not engaged in union activity.

#### **IV. Conclusion**

Ann Dolan engaged in union activity before she was rehired to work at the Ybor P&DC. That activity continued after she was hired, when she demanded that Respondent abide by the terms of the contract, demanded that she be permitted to consult with Union representatives, and asked for a *Weingarten* representative. Supervisor Wray's statement that Dolan's discharge was not up for debate because she had been nothing but trouble and had gone to the union on a daily basis reveals Respondent's animus toward Dolan's continued union activity. That animus caused Respondent to discharge Dolan, and any other reason offered by Respondent is mere pretext. Accordingly, the record evidence establishes that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Dolan as alleged in the Complaint.

To remedy this violation, Counsel for the General Counsel seeks an Order that requires Respondent to immediately

1. Cease and desist its unlawful conduct in all respects;
2. Reinstate Dolan to her former position, or to a substantially equivalent position, without prejudice to her seniority or any other rights she may have enjoyed;
3. Fully remedy Respondent's unlawful discharge of Dolan by making her whole for any losses suffered as a result of Respondent's unlawful conduct, with interest, and compensation for excess tax liability; and
4. Post a Notice to Employees at its Ybor P&DC.<sup>10</sup>

Counsel for the General Counsel also requests that the Administrative Law Judge order any other relief deemed just and proper to effectuate the purposes of the Act.

**DATED** at Tampa, Florida this 5<sup>th</sup> day of July, 2018.

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<sup>10</sup> A proposed Notice To Employees is attached hereto.

### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document, General Counsel's Brief to the Administrative Law Judge, in case 12-CA-207188 was served this 5<sup>th</sup> day of July 2018, as follows:

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